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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 INFODELI, LLC,

11 Plaintiff,

12 v.

13 AMAZON WEB SERVICES, INC.,

14 Defendant.

CASE NO. C17-0281JLR

ORDER DIRECTING
SUPPLEMENTAL BRIEFING

15 **I. INTRODUCTION**

16 Before the court is Plaintiff InfoDeli, LLC's motion to compel Defendant Amazon
17 Web Services, Inc.'s ("Amazon") to comply with a subpoena. (Mot. (Dkt. # 2).) For the
18 reasons set forth below, the court orders supplemental briefing from the parties.

19 **II. BACKGROUND & ANALYSIS**

20 **A. Events Leading to the Instant Motion**

21 InfoDeli's motion arises from a copyright infringement action currently pending
22 before the United States District Court for the Western District of Missouri ("the

Underlying Action”). (See Mot. at 1; Rosemergy Decl. (Dkt. # 3) ¶ 1); *InfoDeli, LLC, et al. v. W. Robidoux, Inc., et al.*, No. C15-364BCW (W.D. Mo.), Dkt. # 1. In the Underlying Action, InfoDeli alleges that the defendants have misappropriated computer code that InfoDeli wrote. (See Mot. at 2.) InfoDeli further alleges that one of the defendants—Engage Mobile Solutions, LLC (“Engage”)—“permanently stored archival versions of code, including infringing code,” on Amazon’s servers. (*Id.*)

To obtain the allegedly infringing code, InfoDeli served non-party Amazon with a subpoena to produce the archival data Engage allegedly stored on Amazon’s servers.¹ (See *id.* at 1-2; Rosemergy Decl. ¶ 5, Ex. 2 (Dkt. # 3-1) (“Subpoena”).) The subpoena directed Amazon to produce responsive material no later than September 14, 2016. (Rosemergy Decl. ¶ 6; Subpoena at 7.) On September 19, 2016, Amazon served objections to the subpoena.² (Rosemergy Decl. ¶ 9, Ex. 5 (“Obj.”).)

After Amazon objected, the parties met and conferred several times between October 2016 and December 2016 in an attempt to effectuate InfoDeli’s requests. (See Mot. at 3; Rosemergy Decl. ¶ 10.) Nevertheless, on December 16, 2016, Amazon advised InfoDeli that Amazon “intended to stand on its objections to the subpoena” and

¹ InfoDeli first served Amazon by email on August 12, 2016. (Mot. at 2; Rosemergy Decl. ¶ 2.) When InfoDeli’s counsel followed up with Amazon by email, Amazon informed InfoDeli that Amazon would not accept service by email and directed InfoDeli to serve the subpoena by mail. (Rosemergy Decl. ¶ 4.) Accordingly, on August 30, 2016, InfoDeli served Amazon with the subpoena by certified mail. (*Id.* ¶ 5, Ex. 3.)

² Amazon also “produced approximately 300 pages of responsive information including account registration details and records describing [Engage’s] account usage history including data transfers by date and size, dating back to January 1, 2014.” (Chock Decl. (Dkt. # 14) ¶ 7.) InfoDeli contends that this production is inadequate. (See Reply (Dkt. # 21) at 5 n.3.)

1 “would not be complying with the subpoena.” (Mot. at 3; Rosemergy Decl. ¶ 10.)

2 InfoDeli filed its motion to compel on February 21, 2017. (*See generally* Dkt.)

3 **B. Amazon’s Response**

4 In response, Amazon asserts that InfoDeli’s motion to compel is untimely.³ (Resp.
5 (Dkt. # 13) at 4-7; Mot. at 1 (filing motion to compel on February 21, 2017); *see also*
6 *InfoDeli v. W. Robidoux*, Dkt. # 378 at 1 (setting discovery deadline of February 20,
7 2017). Courts generally deny as untimely motions to compel filed after the close of
8 discovery unless the court’s scheduling order sets a different date. *See, e.g., Short v.*
9 *Equifax Info. Servs. LLC*, No. 3:14-CV-0471-YY, 2016 WL 6683563, at *3 (D. Or. Nov.
10 14, 2016); *Voter v. Avera Brookings Med. Clinic*, No. Civ. 06-4129-KES, 2008 WL
11 4372707, at *1 (D.S.D. Sept. 22, 2008) (collecting cases); *David v. Signal Int’l, LLC*, No.
12 08-1220, 2014 WL 6612598, at *2 (E.D. La. Nov. 19, 2014) (same). In considering
13 whether to allow an untimely motion to compel, courts consider the following factors:
14 (1) how long after the discovery deadline the moving party filed its motion to compel; (2)
15 the amount of time the moving party knew about the discovery; (3) whether the court has
16 previously extended the discovery deadline; (4) the moving party’s reason for its delay or
17 tardiness; (5) whether dispositive motions have been filed or scheduled; (6) the age of the
18 case; (7) any prejudice to the party from whom the moving party seeks untimely
19 discovery; and (8) whether the untimely motion disrupts the court’s schedule. *See Short*,
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³ The court does not address at this time the merits of InfoDeli’s motion, the merits of
Amazon’s opposition to the motion, or other issues that the parties raise in those filings.

1 2016 WL 6683563, at *3; *David*, 2014 WL 6612598, at *3; *Days Inn Worldwide, Inc. v.*
2 *Sonia Invs.*, 237 F.R.D. 395, 398 (N.D. Tex. 2006).

3 In the Underlying Action, the Honorable Brian C. Wimes stayed discovery on all
4 matters unrelated to InfoDeli’s copyright infringement claim. *InfoDeli v. W. Robidoux*,
5 Dkt. # 141 at 5-6 (granting the defendants’ motion for “a stay of discovery of all issues
6 that are unrelated to their liability under Count I, for copyright infringement”).
7 Accordingly, Judge Wimes’s scheduling orders allowed the parties to conduct discovery
8 related only to InfoDeli’s copyright infringement claim. *See id.*, Dkt. ## 49, 151, 206,
9 281, 297, 327, 378 (scheduling orders). After extending the initial discovery cut-off six
10 times, Judge Wimes issued his final scheduling order related to the copyright
11 infringement phase of the case and ordered that discovery be completed no later than
12 February 20, 2017. *Id.*, Dkt. # 378 at 1.

13 Nevertheless, InfoDeli contends in its reply brief that its February 21, 2017,
14 motion is “not untimely because the discovery at issue is not solely related to the issue of
15 infringement.” (Reply at 8.) InfoDeli also states that the discovery it seeks from
16 Amazon is “relevant to willfulness [and] spoliation” and “was also identified in a Rule
17 56(d) [d]eclaration as being necessary to respond to a currently pending [m]otion for
18 [s]ummary [j]udgment.” (*Id.*) Further, although InfoDeli does not advance this argument
19 in its briefing, Amazon provides an email from InfoDeli’s counsel in which InfoDeli
20 contends that it filed its motion to compel one day late because February 20, 2017, fell on
21 a federal holiday—President’s Day. (Wigginton Decl. (Dkt. # 16) ¶ 12, Ex. S.)

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1 InfoDeli filed its motion to compel one day after the close of discovery, even
2 though Judge Wimes’s scheduling order set a date certain—February 20, 2017—for the
3 close of discovery. (*See* Mot. at 1); *cf. Sloan v. Country Preferred Ins. Co.*, No.
4 2:12-CV-01085-KJD-PAL, 2013 WL 1405852, at *1 (D. Nev. Apr. 4, 2013) (“When the
5 Court specifies a date for a response, the response is not untimely when it is filed on or
6 before that date.”). Further, it does not appear that Judge Wimes has lifted the stay on
7 discovery of any of InfoDeli’s non-copyright infringement claims. *See InfoDeli v. W.*
8 *Robidoux*, Dkt. # 141 at 5-6; *id.*, Dkt. # 358. In addition, there is no indication that Judge
9 Wimes has yet ruled on InfoDeli’s Rule 56(d) request or otherwise allowed additional
10 discovery. *See id.*, Dkt. # 417-3; *see also* Fed. R. Civ. P. 56(d)(2) (“If a nonmovant
11 shows by affidavit [that] it cannot present facts essential to justify its opposition, the
12 court may . . . allow time to obtain affidavits or declarations or to take discovery . . .”).
13 Therefore, based on the docket in the Underlying Action, it appears that InfoDeli has
14 filed an untimely motion to compel or attempted to engage in discovery of matters
15 subject to the stay.

16 **C. Supplemental Briefing**

17 The court directs the parties to file simultaneous supplemental briefing on the
18 issue of whether InfoDeli’s motion to compel is timely, and if it is untimely, whether the
19 court should nevertheless consider the motion. The parties must limit their supplemental
20 briefing to no more than five (5) pages each and must file the briefing no later than
21 Tuesday, April 18, 2017, at 5:00 p.m. The parties must address the relevant case law on
22 untimely motions to compel, including the factors articulated in this order, and discuss

1 how the procedural posture of the Underlying Action affects whether the court should
2 consider the merits of the motion to compel. The court will not consider any issues the
3 parties raise that are beyond the scope of the issues raised in this order.

4 **III. CONCLUSION**

5 For the reasons set forth above, the court ORDERS the parties to file simultaneous
6 supplemental briefing of no more than five (5) pages. The parties' briefs are due no later
7 than Tuesday, April 18, 2017 at 5:00 p.m.

8 Dated this 11th day of April, 2017.

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11 JAMES L. ROBART
12 United States District Judge
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